HAMIT MATUSIN

v.

SUPERINTENDENT OF LANDS AND SURVEYS & ANOR

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[SUIT NO: MR 49 OF 1983]
22 MARCH 2001

LAND LAW: *Customary land - Whether plaintiffs have acquired customary rights - Whether land within river bank reserve - Period when native customary rights first acquired - Burden of proof - Whether defendant to discharge burden of proof - Section 5(3)(a) of the Land (Classification) Ordinance 1948*

The plaintiffs in these seven consolidated suits brought an action against the defendants seeking, among others, a declaration that the plaintiffs have acquired customary rights over their plot situated at Kampung Dagang, Miri, Sarawak ("the said lands") and that the plaintiffs were entitled to use and occupy the same.

When this action was brought before in a previous trial on March 1991, the plaintiffs obtained judgment in their favour which was subsequently set aside on appeal by the defendants to the Supreme Court. A retrial was ordered before another judge and both parties came to an agreement that the only issue for determination at the retrial is whether the plaintiffs' houses were in the river bank reserve.

The defendants asserted that the said plots were within the river bank reserve and that by reason thereof, no person may by virtue of s. 38(1) of the Land Code (Cap 81) acquire a title thereto. The central issue for this court to determine was, whether or not the plaintiffs' plots were within the river bank reserve ("the central issue").

Held:

[1] Before proceeding to determine the central issue, two questions have to be answered first *ie*; the period when such determination of the central issue is to be made and secondly, on the burden of proving the same. Such period shall depend on when the native customary rights were first acquired, on or before 1 January 1958, or alternatively on or before 2 November 1956 if s. 5(3)(a) of the Land (Classification) Ordinance 1948 applies in respect thereof, or at any time thereafter. With regards to the acquisition of native customary rights, there were no evidence adduced by both parties when such rights were first acquired.

[1b] On the burden of proof, since it was the defendants who asserted the river bank issue, thus it was on them to discharge the burden of proof.

[2] The defendants relied on a physical survey and a photogrammetric map produced from aerial photographs taken in 1964 to prove its case. However, it was found that the survey was not carried out in accordance or in compliance with certain accepted practices and as such, the accuracy, correctness or propriety of the survey was questionable. Thus, it could not be used as a basis in determining whether or not the said lands were within the river bank reserve.

[3] Even if the burden of proof lies on the defendants to prove the river bank issue, the court is not precluded from evaluating and looking at the evidence led by the plaintiffs in making the findings. From the evidence led by the plaintiffs' witness, PW11, it was found that certain plots of land were at a point of time after 1 January 1958 within the river bank reserve while other plots of land were at all material times outside the river bank reserve. On this basis, judgment was entered accordingly for each suit.

[Order accordingly.]

Case(s) referred to:
Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johore [1996] 4 CLJ 1 ***(refd)***
Ng Kim Huat v. PP [1961] 27 MLJ 308 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 36, 83
Land (Classification) Ordinance 1948, s. 5(3)(a)
Land Code (Cap 81), ss. 2, 5(2), 10(2), 38(1)
Land Ordinance (Cap 27), s. 6

Other source(s) referred to:
Law for Surveyors (Chapter 5), New Zealand Institute of Surveyors, pp 1-2
Survey Law in Canada, Canadian Council of Land Surveyors, (1989), p 179

Reported by Raja Vishnu Sivarajah

JUDGMENT

Sulaiman Daud JC:

By writs issued at various dates, each of the plaintiffs in these seven consolidated suits brought an action against the Superintendent of Lands and Surveys, Fourth Division and the Government of Sarawak seeking, among

others, a declaration that at all material times to this action, the plaintiffs have acquired customary rights over their plot situate at Kampung Dagang, Miri, Sarawak as more particularly shown and described in annexure A ("the said lands") to the respective statement of claims and that the plaintiff was entitled to use and occupy the same.

At the outset it is necessary to briefly state the facts of the case and the background of this hearing. On 13 March 1991, the learned judge who heard this action ("the previous trial") adjudged and declared, after a full trial, that each of the plaintiffs had at all times material to the suits acquired customary rights over that plot in respect of which the declaration was sought and was entitled to use and occupy the same. However on 21 July 1994 the Supreme Court, on appeal by the defendants, set aside the said judgment and ordered a retrial of all the consolidated cases before another judge. The case was subsequently heard before another judge and on 17 May 1995 at one of such hearing the parties, through their respective counsel, came to an agreement that the only issue for determination at the retrial is whether the plaintiffs' houses were in the river bank reserve. With regard to the evidence adduced at the previous trial, it was also agreed between both parties that such evidence be incorporated as part of the evidence of this fresh trial but however subject to the condition that each party shall be at liberty to adduce any further evidence in relation thereto. The parties further agreed that all other findings of fact and law in the previous trial shall be binding upon the parties in so far as relevant. On the mode of trial, it was agreed that the plaintiff will first adduce evidence that the houses were not in the river bank reserve which will then be rebutted by the defence.

In the amended defence dated 5 August 1995, the defendant made the necessary amendment to the defence to plead the point in issue, in particular to paras. 3 and 8 thereof. The amended paras. 3 and 8, with the relevant amendment shown in the italics, read as follows:

> 3. The 1st and 2nd Defendants admit the allegations contained in paragraph 3.1, 3.2, and 3.3 of the Statement of Claim save that in paragraph 3.1 thereof, the Defendants deny that the said plots of land belonged to the Plaintiffs as alleged. *The 1st and 2nd Defendants further say that the said plots of land were within the River Bank Reserve as provided under section 38 of the Land Code (Cap 81)*; and
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> 8. The 1st and 2nd Defendants admit the allegations contained in paragraph 8 of the Statement of Claim but deny that the Plaintiffs had any customary right therein and aver that the extinguishment of the same was not necessary in the circumstances. *The 1st and 2nd Defendants repeat paragraph 3 hereof.*

Finding Of Facts And Law In The Previous Trial

Since both parties have agreed to be bound with all other findings of fact and law in the previous trial it is necessary for me at this stage to determine what such findings were. In the previous trial, the learned judge in considering the claim of the plaintiffs have considered two central issues, firstly whether the plaintiffs have acquired native customary rights over the lands on which their houses were situated; and secondly, if answered in the positive, whether the plaintiffs were permitted by their native custom to part with (the land and the houses) or transfer them to others within the same community.

With regard to the first issue, it is clear to me from the judgment of the previous trial that the learned judge has held that the plaintiffs have acquired native customary rights over the said land on the following ground:

(a) That the plaintiffs have met the basic qualification to claim native customary rights.

(b) From the memorandum of surrender of customary rights to the State No. 204/1978 (see pp. 17-19 in exh. P2) made by one of the plaintiff, there would appear to be implicit recognition of native customary rights over those lands by the defendants.

(c) That there were unchallenged evidence of the plaintiffs that they have acquired native customary rights claimed over those lands prior to 1 January 1958 by occupation of buildings or houses.

(d) That the plaintiffs have by way of oral and documentary evidence clearly showed that the native customary rights in those land were properly acquired by them either by way of a gift or transfer or occupation.

(e) That the plaintiffs were in occupation of the houses on the said land before they were demolished.

It is also clear from the said judgment that the learned judge has totally disregarded all evidence adduced by the parties relating to the issue on the river bank reserve on the ground that they were not pleaded. It is on this ground that the Supreme Court made the order of retrial. With regard to the second issue abovementioned the learned judge held that the native customary rights over the land at Kampung Dagang can be transferred for value to members of the same community, and that the renting of the houses to non-native would not adversely effect or extinguish the plaintiffs' native customary rights over the said lands.

The question as to whether or not the plaintiffs' plots were within the river bank reserve is in my opinion directly related to the issues on the acquisition of native customary rights by the plaintiffs. It is clear that the defendants in their amended defence denied the acquisition of any native customary rights by the plaintiffs by virtue of s. 38 of the Land Code (Cap 81). The said s. 38 in so far as relevant provides as follows:

> 38.(1) Save where express provisions is made to the contrary in any document of title by any general or special direction of the Minister, all unalienated land situate within the limits stated below shall be reserved to the Government, and no one may acquire a title to the same or any part thereof:
>
> (a) all land adjoining the sea coast within sixty-six feet of mean high water mark;
>
> (b) all land within sixty-six feet on each side along the banks of all navigable rivers, stream, canals or creeks:

Prior to the date of coming into force of the Land Code (Cap 81) on 1 January 1958, a substantially similar provision was provided in s. 6 of the repealed Land Ordinance (Cap 27) prohibiting the acquisition of title in respect of all unalienated land situate within the limit of sixty-six feet of high water mark or within sixty-six feet on each side along the banks of all navigable rivers. Be that as it may, before I proceed to determine the central issue as to whether the said lands are within the river bank reserve two related questions have to be firstly answered. The first question relates to the period when such determination is to be made and secondly on the burden of proving the same.

Period Of Time When Determination Is To Be Made

The plaintiffs in their respective reply to the defence dated 19 September 1995 pleaded, among others, as follows:

> 2A. The plaintiffs do not admit that the said plots of land were within the River Bank Reserve as provided under section 38 of the Land Code (Cap 81) as alleged in paragraph 3 of the Amended Defence or at all.
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> 2B. The plaintiffs will rely on the Land (Classification) Ordinance, 1948, as amended by the Land (Classification) (Amendment) Ordinance 1954, and aver that the onus is upon the defendants to establish that the said plots of land were situated within the River Bank Reserve prior to the 24th day April 1954.

From the pleadings as set out above it is the plaintiffs' case that the relevant period for determining the central issues was on or before 24 April 1954. However during submission before me, the learned counsel contended that the

relevant date for such determination was 4 May 1983, being the date when the plaintiffs' houses over the said land were demolished. On the other hand the defendants in their defence merely pleaded that the said plots were within the river bank reserve by reason of which no native customary rights may be acquired or created. But during submission the learned deputy state attorney-general, for the defendants, submitted that the relevant date to determine whether or not such land was within the river bank reserve was the date when the plaintiff acquired such customary rights. With regard to the acquisition of the native customary rights the learned judge at the previous trial, without considering the evidence on the defence of river bank reserve, in holding that the plaintiffs have acquired native customary rights over the said land stated as follows:

> It is not disputed that the plaintiffs by way of oral and documentary evidence clearly showed that the native customary rights in the houses were properly acquired by them either by way of gifts, transfer or occupation. We have evidence of the plaintiffs paying rates to the Miri District Council (see pp. 49 to 54 of exhs. P1) or effecting repairs or renting them out to others until their houses were demolished.

Upon examining the pleadings of both parties and the finding of the judge at the previous trial, in my view, the question as to whether or not the plaintiffs' plots were within the river bank reserve should be determined at two point of time, firstly at the time when the native customary rights were alleged to have been first acquired by the plaintiffs or, in the case where such right was acquired by way of gift or transfer or occupation, by the persons from whom the plaintiffs acquired such right; and secondly, if such right were so acquired, such determination (whether such lands were within the river bank reserve) may be made at any time after such acquisition.

Section 5 of the Land Code (Cap 81) provides that as from 1 January 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in sub-s. (2) thereof but no recognition shall be given to any native customary rights over any land in Sarawak created after 1 January 1958. However if such land is a mixed zone land and has been declared under s. 5(3) of the Land (Classification) Ordinance 1948 ("the 1948 Ordinance") to be native area land, no such native customary rights may by virtue of para. (a) thereof be acquired over such land on or after 21 May 1954, being the day the said para. (a) came into force.

Based on the aforesaid provisions a native customary rights can only be first created or acquired, other than acquisition by way of transfer, gift or occupation, on or before 1 January 1958 or, in the case of a mixed zone land

which has been declared to be native area land before 1 January 1958, on or before it was so declared. In the instant case during submission the learned Deputy State Attorney General furnished evidence by way of Sarawak Government Gazette dated 2 November 1956 that the area where the said land is situated had been declared to be a Native Area Land with effect from the date of the Gazette. However in the absence of any evidence to show that such land was Mixed Zone Land before it was declared to be Native Area Land, I ruled that s. 5(3)(a) of the 1948 Ordinance shall not apply. In my view the first relevant period to determine whether or not the said lands were within the river bank reserve is on or before 1 January 1958. However if I am wrong in so deciding that s. 5(3)(a) of the 1948 Ordinance does not apply, then such relevant period shall be on or before 2 November 1956.

With regard to the second relevant period for making such determination it is clearly provided in s. 10(2) of the Land Code (Cap 81) that no person may occupy any Native Customary Land or any Reserved Land save under and in accordance with the conditions applicable thereto by virtue of this or any other written law. All land within sixty-six feet on each side along the banks of all navigable rivers and streams fall within the definition of Reserve Land in s. 2 of the Land Code. In other words no native customary rights are capable of being acquired if the said land were within the river bank reserve before 1 January 1958. Similarly where a native customary right have been acquired and if, after its acquisition, it becomes a river bank reserve such right shall cease to subsist. By reason thereof I am of the view that the defendants can also succeed in their defence if they can prove that the said lands were or are within the river bank reserve at any time on or before 15 January 1958 or if native customary rights have been acquired, at any period of time after such acquisition. It is to be noted that it was also the finding of the learned judge at the previous trial that a native customary right over the said lands at Kampung Dagang can be transferred for value to members of the same community. With regard to the acquisition of the native customary rights, there were no evidence adduced by both parties when such rights were first acquired.

Having ascertained the relevant period for determining the issue on the river bank reserve the further question to be answered is on whom lies the burden of proof that the said lands were within the river bank reserve on or during the two relevant period as aforesaid.

Burden Of Proof That The Said Lands Were Within The River Bank Reserve

On the burden of proof, the learned counsel for the plaintiff submitted that such burden lies on the defendants. He pointed out the defendants in the amended defence asserted that the said plots were within the river bank reserve

as provided under s. 38 of the Land Code (Cap 81) and therefore were liable to be removed by order of the Minister without compensation. By asserting such defence the learned counsel argued the defendants must bear the onus of proof in respect thereof based on the principle that "he who asserts must prove". In support of the said principle he cited several authorities one of which is the decision of the Court of Appeal in *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johore* [1996] 4 CLJ 1. In that case the appellant exercised his option to purchase out of time one unit of low cost house built by the respondent. However the respondent waived the breach and offered to sell such unit for RM14,000 but the offer was rejected by the appellant. He asserted that there was an oral representation by Tan Sri Basir, the director of the respondent, to sell the said unit at a price between RM7,000 to RM8,000. On the onus of proof in respect of the representation his lordship Mokhtar Sidin JCA stated at p. 12:

> It is clear that it was the plaintiff who asserts that Tan Sri Dato' Haji Basir who made the offer, the onus is on the plaintiff to satisfy the Court that such an offer was ever made. This is clearly provided by ss. 101 and 103 of the Evidence Act 1950. The sections read as follows:
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> 101. Burden of Proof
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> (1) Whoever desire any Court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that these facts exist;
>
> (2) When the person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> 103. Burden of proof as to Particular fact
>
> The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact lies on any particular person.
>
> It is clear from the above provisions on whom the onus lies. In the present case it is the plaintiff who had asserted that there exists a particular fact *viz*, that there was an offer to sell the said land at the price between RM7,000 to RM8,000. The onus is on the plaintiff to satisfy the Court there was such an offer.

In the instant case it is the defendants who asserted that the said plots were within the river bank reserve and by reason thereof no person may by virtue of s. 38(1) of the Land Code (Cap 81) acquire a title thereto. Applying the principle "he who alleges must prove the allegation" as laid down in the *Juahir Sadikon* case, I agree with the learned counsel for the plaintiffs that the onus is, thus, on the defendants to satisfy the court that the said plots were within

a river bank reserve when the native customary rights were first acquired on or before 1 January 1958 (or alternatively on or before 2 November 1956 if s. 5(3)(a) of the 1948 Ordinance apply in respect thereof) or at any time thereafter.

Whether The Said Lands Were Within The River Bank Reserve The Defendants' Case

The defendants seek to prove that the said lands were within the river bank reserve by relying upon a physical survey under Job 210/79 tendered as exh. D1 to offset the positions of the houses from the river bank represented by a black curve thereon, and upon a photogrammetric map produced from aerial photographs taken in 1964 and tendered as exhs. D4. For such purpose the defendants called three witnesses DW3, DW4 and DW5.

Evidence Of DW3

DW3, a staff surveyor of the Department of Lands and Surveys, testified that the survey in Kampung Dagang was conducted by way of physical survey of distance and angle bearing by Job Instruction No. 210/69 (in actual fact No. 210/79). According to DW3 the river bank would be identified by the edge of the vegetation before certain change of the terrain of the land but since there is no clear definition of the edge of the river bank in the said area the river bank boundary had to be identified from the means high water mark ("MHWM"). The MHWM used by DW3 for the purpose of carrying out such survey was adopted from a survey of high water mark carried out in 1964 by observation of a series of high water mark in the area for one week. The said MHWM was shown by the black curve in exh. D1 ("the said black curve"). DW3 used the said black curve as the river bank boundary to offset the position of the plaintiffs' houses. Based on such physical survey it was found that the plaintiffs' houses, except MDC No. 70, were within the 66 feet river reserve.

The learned counsel for the plaintiffs submitted that all evidence relating to the survey conducted in 1964 to determine the MHWM including that part of exhs. D1 as comprising the black curve representing the MHWM should be excluded by the court on the grounds, among others, that no field data or records of the high water marks used to determine the MHWM or other documents relating thereto were produced and that DW3 evidence on the record of the 1964 survey was contradictory. He further submitted that all the evidence given by DW3 on the 1964 survey of the MHWM was hearsay as DW3 himself was not personally involved in the survey. However upon perusal of the notes of proceedings of the previous trial it is clear to me that this issue on admissibility have been dealt with thereat. The field book of the

Survey Department for the material period was not tendered as evidence by the defendants' counsel on the undertaking given by the plaintiffs' counsel that he was not objecting to the admissibility of Dl but only disputes its accuracy. By reason thereof I am of the view he is estopped from raising the same issues at this stage of the proceedings.

I will next deal with the alternative issue raised by the learned counsel with respect to the determination of the said MHWM. He contended that in the absence of any definition of MHWM in the Land Code (Cap 81) and the method for its determination it is necessary to look at the practise in other jurisdiction for guidance. For such purpose he referred the court to the *Law For Surveyors (Chapter 5)* published by the New Zealand Institute of Surveyors where, at pp. 1-2 in the appendix thereof, the method of determining the MHWM in so far as relevant are set out as follows:

> 1.1 The usual practise is to survey the practical boundary between the land and the sea, for example the foot of the cliff, toe of a bank, edge of vegetation, highest line of driftwood etc. This has the advantage of being meaningful and recognizable boundary capable of quick definition rather than an imaginary line subject to continuous or even daily change. For the sake of conformity and in accordance with land transfer requirements this line as depicted on the survey plan is called the Mean High Water Mark, ...
>
> 1.8 If the owner is not prepared to accept a practical definition of the boundary (toe of the bank, edge of vegetation. Etc.) then the Eduction or Range-Ratio method as described in sections 4.0 and 5.0, or by setting up an automatic tide gauge for at least one month and correcting the result obtained to obtain the 19 year mean equivalent, using the procedure described the Range-Ratio method. The resulting height should be tied to suitable bench marks.

The basic requirements to be satisfied in determining the MHWM are set out in para. 5 thereof and are as follows:

> 5.0 Requirements
>
> 5.1 It is necessary to have access to tidal data from a reference station where an automatic tide gauge is in continuous operation and records for at least one half of a Metonic cycle (i.e. 9.3 years) have been analysed.
>
> The second requirement is a control station where an automatic tide gauge has been established at some time in the past for at least one lunar month or preferably 6 months from which tidal data is available and bench marks related to the tide gauge are recoverable.

The other text referred to is the *Survey Law in Canada* (1989) by Canadian Council of Land Surveyors where, on the determination of MHWM, it was stated at p. 179 as follows:

> ... To correct Mean High Water elevations for local variations, surveyors have recommended that tidal observations should be made at the survey site and compared with simultaneous observations at nearby control stations where Mean High Water elevation is known. These observations, usually made with a graduated tide staff, generally span one or two consecutive high and low water cycles. Once a local Mean High Water elevation has been calculated, either a contour or the water line can be staked when that elevation is observed to occur on the tide staff.

In the instant case the MHWM in D1 was based on tidal waters in the said area and therefore in my view the method adopted by other jurisdiction for the determination of MHWM as illustrated above can be used as a guide in determining the accuracy, correctness or propriety of the survey carried out in 1964 to determine the said MHWM. In the absence of any other authority or evidence to the contrary adduced by the defence, I tend to agree with the learned counsel for the plaintiffs that the survey carried out in 1964 to determine the MHWM was not carried out in accordance or in compliance with certain accepted practice such as the requirement to have a tidal data from a reference station where an automatic tidal gauge is in continuous operation and data from a control station where automatic tide gauge has been established at some time in the past for at least one lunar month or preferably six months from which tidal data is available. By reason thereof I am of the view that the accuracy, correctness or propriety of the 1964 survey to determine the MHWM used in offsetting the plaintiffs' houses are questionable.

DW4

The next witness to testify for the defendant on the river bank reserve is DW4, staff surveyor with the Department of Lands and Surveys, Miri. According to DW4 three of the said houses were right on a river bank, three within the river bank reserve and the remaining house is outside the river bank reserve. However the measurement was taken from the nearest part of the house to the river bank which in this case was the black curve in D1. In view of my earlier finding as to the propriety, correctness and accuracy of the MHWM as represented by the black curve in D1, I likewise hold that the survey work conducted by DW4 were not proper or accurate and cannot be used as a basis in determining whether or not the said lands were within the river bank reserve.

DW5

The defendants' other witness on the river bank issue is DW5, a photogrammetrist of the Department of Lands and Surveys. DW5 relied on the photogrammetric map (exh. D4) produced from aerial photographs in 1964. As can be seen the river bank reserve therein was also determined by digitizing exh. D1 into the photographic map. When asked he agreed that the river bank shown in exh. D4 were taken from exh. D1. He also agreed that the validity of his finding depends on the accuracy of the river bank shown in exh. D1, that is the black curve representing the MHWM therein. For the reason stated earlier, I am also of the view that the river bank as shown in exh. D4 cannot be used as the basis in determining whether or not the said lands were at the material time within the river bank reserve.

I am also in agreement with the plaintiffs' counsel that ss. 36 and 83 of the Evidence Act 1950 shall not apply in respect of the accuracy of MHWM on D1. The said s. 36 provides for the relevancy of statement of facts in issue or relevant facts made in published maps or charts generally offered for public sale or in maps or plans made under the authority of the government. Section 83 provides for the accuracy of maps or plans made by authority of the government. For such a presumption to apply in the instant case there must be proof of the existence of the survey map, plan or chart in respect of the survey carried out in 1964 to determine the MHWM. Such a requirement was stated by Thomson CJ (as he then was) in the case of *Ng Kim Huat v. PP* [1961] 27 MLJ 308, at 309:

> It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point the bare potential existence of such a presumption cannot of itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising.

As correctly pointed out by the learned counsel for the plaintiffs, there can be no presumption as to the accuracy of the black curve in exh. D1, as representing the MHWM, unless the map, chart or plan showing the said MHWM from which the black curve in exh. Dl was drawn was produced as evidence.

It is my finding that the 1964 survey in establishing the MHWM was not properly conducted and accurate. It therefore necessarily follows that all survey works using the black curve in exh. D1 as the MHWM or the river bank boundary were also not properly conducted or accurate and cannot be used as a basis in determining whether or not the said lands were within the river bank reserve.

Plaintiffs' Case

In determining whether or not the defendants have succeeded in discharging the burden of proof on the river bank issue I have to evaluate the evidence led by both the plaintiffs and the defendants relating thereto. Five of the plaintiffs, namely PW1, PW3, PW5, PW6 and PW7, testified in cross-examination that their houses were outside the 66 feet river bank reserve at the time their houses were removed or demolished in 1983. However I have to weigh these evidence against other evidence especially those adduced by expert witnesses called by both the parties. The plaintiffs called PW10 and PW11 to prove that the said plots of lands were outside the river bank reserve in accordance with the agreed mode of trial aforesaid.

PW10

PW10, WJ Apgar, was called by the plaintiffs to dispute the accuracy of the river bank based on the MHWM as represented by the black curve in exh. D1. He is an engineer by profession with experience in oceanography and has participated in coastline survey but had not conducted any survey on river or land. In preparing his report he relied, among others, on aerial photographs taken in 1964 (exh. P9) and in 1977 (exh. P10). According to PW10, the 1964 aerial photographs (exh. P9) showed that the palm trees at the relevant area where about 6 to 10 metres from the high water mark and the plaintiffs' houses were all behind the tree line. Exhibit P11, which is an enlargement of a segment of exh. P10, indicated that the shoreline was accreting. PW10 in his report in exh. P4 and in his evidence concluded that the true shoreline as signified by high water mark was 19 to 23 metres from the tree line as shown in the 1964 aerial photograph (exh. P9) and that all the houses in question were outside the river bank reserve in 1964. However, upon the evidence given by DW5 in respect of the report made by PW10, I agree with the submission of the learned counsel for the defendants that the methodology applied by PW10 in providing the composite map in exh. P4 are erroneous and that the analysis as well as the conclusion reached in terms of the river bank reserve may not be accurate. By reason thereof I cannot give any weight to the evidence and report prepared by PW10.

PW11

The evidence of PW11 was given before me. PW11 used and analysed the aerial photographs for 1964 and 1977 and the tidal charts to locate the edge of dry land (tidal shorelines). He then plotted the edge of the dry land for both such periods and used such tidal shoreline to offset the river bank reserve. No substantial challenge was mounted by the defendants' counsel in the cross-examination to the method used and the accuracy of the analysis. I am

also satisfied with the explanation given by PW11 in respect of the methods used by him and his finding as contained in exh. P20. From the analysis of the 1964 photograph as in figure 4 of exh. P20, PW11 found that houses No. 4, 5, 6 and 7 were outside the river bank reserve while houses No. 1, 2 and 3 were within the riverbank reserve.

As I have formed the view that any native customary rights acquired in respect of any land shall cease or determine upon the land becoming a reserve land, the next step is to determine whether or not based on the totality of evidence before me any of the said lands and the houses built thereon have at any time on or before or after 15 January 1958 (or 2 November 1956, as the case may be) were located within the river bank reserve. In the instant case even if the burden of proof lies on the defendants to prove the same I am also not precluded from evaluating and looking at the evidence led by the plaintiffs in making my finding.

Apart from making submission directly related to the river bank issue as earlier agreed between the parties, both the learned counsel for the plaintiffs and the defendants submitted on other ancillary and incidental issues. The learned counsel for the defendants seeks to open up the issues on the acquisition of the native customary rights which in my view is not related to the river bank issue. Likewise the learned counsel for the plaintiffs submitted that the defendants ought to be barred from raising the defence that the plots of land are within the river bank reserve based on the principle *"Allegans contraria non est audiendus"*. He pointed out all the said lands have been alienated by the defendants to a third party under the Land (River and Road Reserve Alienation) Directions 1983 after the plaintiffs were removed therefrom. In view of the agreement reached between the parties to confine the rehearing on the river bank issue only in my opinion they are estopped from raising these additional issues.

Based on all the evidence before me, including the report prepared by PW11 on his analysis of the aerial photographs taken in 1964 and 1977 and the relevant tidal charts, it is my finding that:

(a) Those plots of land as described in annexure A to the statement of claim in respect of Suit No. MR 49 of 1983, Suit No. MR 52 of 1983 and Suit No. MR 58 of 1983 were at a point of time after 1 January 1958 within the river bank reserve; and

(b) Those plots of land as described in annexure A to the statement of claim in respect of Suit No. MR. 50 of 1983, Suit No. MR. 57 of 1983, Suit No. MR. 61 of 1983 and Suit No. MR. 76 of 1988 were at all material times outside the river bank reserve.

Accordingly the application in Suit No. MR 49 of 1983, Suit No. MR 52 of 1983 and Suit No. MR 58 of 1983 are hereby dismissed with costs herein and the costs in the previous proceedings. I enter judgment in terms of prayer (1) and (2) of the amended writ and statement of claim in respect of Suit No. MR. 50 of 1983, Suit No. MR. 57 of 1983, Suit No. MR. 61 of 1983 and Suit No. MR.76 of 1988 with costs herein and in the previous proceedings. Damages to be assessed by the learned senior assistant registrar at a date to be fixed.